

# **AGRICULTURE DECISIONS**

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THIS IS A COMPILATION OF DECISIONS ISSUED BY THE  
SECRETARY OF AGRICULTURE AND THE COURTS  
PERTAINING TO STATUTES ADMINISTERED BY THE  
UNITED STATES DEPARTMENT OF AGRICULTURE

## AGRICULTURE DECISIONS

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The published decisions and orders may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket number, e.g., AWA Docket No. 99-0022, and the use of such references generally indicates that the decision has not been published in *Agriculture Decisions*. Decisions and Orders found on the OALJ Website may be cited as primary sources.

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**DEPARTMENTAL DECISIONS**

**SHANNON P. CASEY**

**Docket No. 11-0131.**

**Decision and Order.**

**Filed July 6, 2011.**

**PACA**

Charles Spicknall, Esq. for AMS.

Petitioner Pro se.

*Decision and Order by Chief Administrative Law Judge Peter M. Davenport.*

**Decision and Order**

**Preliminary Statement**

This proceeding was initiated under the Perishable Agricultural Commodities Act, 1930, as amended, (7 U.S.C. §499a, *et seq.*) (PACA or the Act) by the petition for review filed by the Petitioner Shannon P. Casey of the determination made by Karla D. Whalen, Chief of the PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service (Respondent) that he was “responsibly connected” (as that term is defined in Section 1(b)(9) of the Act (7 U.S.C. §499a(b)(9))) to Tan-O-On Marketing Incorporated (TMI), during the period of time that TMI violated Section 2 of the Act (7 U.S.C. §499b).

TMI, a PACA licensee, was the subject of an order from a reparation formal complaint issued against it in favor of McNeil Fruit & Vegetable, LLC, Idaho Falls, Idaho requiring TMI to pay \$74,594.24, plus \$500.00 and 0.44% interest from and after January 10, 2010.<sup>1</sup> Subsequently, five additional reparation complaints became final under PACA, totaling \$355,638.21.<sup>2</sup>

This matter was set for hearing to commence in Washington, DC on May 17, 2011. Prior to the hearing, Petitioner Casey sent the Hearing

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<sup>1</sup> RX-1

<sup>2</sup> RX-2 to RX-6

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Clerk an email indicating that he would not attend due to his inability to obtain an attorney to represent him, his financial condition, and his unwillingness to subject himself to the position of being asked questions by government attorneys<sup>3</sup>.

At the hearing, although authorized by the Rules of Practice to request a default decision and order by reason of the Petitioner's failure to appear, the Respondent elected to introduce evidence without the Petitioner's participation. Three witnesses were called by the Respondent<sup>4</sup> and 45 exhibits were introduced and admitted on behalf of the Respondent.<sup>5</sup> The Respondent has filed a brief on behalf of the Agency and although none has been received from the Petitioner, the matter is now ripe for disposition.

### Statutory Background

The Perishable Agricultural Commodities Act, 1930,<sup>6</sup> was enacted to suppress unfair and fraudulent practices in the marketing of perishable agricultural commodities in interstate or foreign commerce.<sup>7</sup> When enacted, the legislation had the approval of the entire organized fruit and vegetable trade, including commission merchants, dealers and brokers, all of whom benefit from the Act's protections.<sup>8</sup> The Act was intentionally a "tough" law enacted for the purpose of providing a measure of control over a branch of industry which is engaged almost exclusively in interstate commerce, which is highly competitive, and in which the opportunities for sharp practices, irresponsible business conduct, and unfair methods are numerous.<sup>9</sup> *Kleiman & Hochberg, Inc. v. U.S. Dep't of Agric.*, 497 F.3d 681, 693 (D.C. Cir. 2007).

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<sup>3</sup> Document # 8

<sup>4</sup> The transcript of the proceedings is contained in one volume. References to the Transcript will be indicated as Tr. and the page number.

<sup>5</sup> The Agency exhibits are designated RX 1-45.

<sup>6</sup> 7 U.S.C. §499a-499s.

<sup>7</sup> HR Rep No 1041, 71<sup>st</sup> Cong, 2d Session 1 (1930)

<sup>8</sup> *Id.* 2,4. In 1949, both the House and Senate found that the PACA regulatory program had "become an integral part of the marketing of fruit and vegetables and it has the unanimous support of both producers and handlers in the fruit and vegetable industry." HR Rep No 1194, 81<sup>st</sup> Cong, 1<sup>st</sup> Session 1 (1949); *accord*, S Rep No 1122, 1<sup>st</sup> Session 2 (1949).

<sup>9</sup> S Rep No 2507, 84<sup>th</sup> Cong, 2d Session 3-4 (1956), *reprinted in* 1956 U.S.C.A.N. 3699, 3701; HR Rep No 1196, 84<sup>th</sup> Cong, 1<sup>st</sup> Session 2 (1955).

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Under the Act, persons who buy or sell specified quantities of perishable agricultural commodities at wholesale in interstate commerce are required to have a license issued by the Secretary of Agriculture. 7 U.S.C. §499a(b)(5)-(7), 499c(a), and 499d(a). The Act makes it unlawful for a licensee to engage in certain types of unfair conduct and requires regulated merchants, dealers, and brokers to “truly and correctly...account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had.” 7 U.S.C §499b(4).

Orders suspending or revoking a license, or a finding that an entity has committed a flagrant or repeated violation of Section 2 of the Act have significant collateral consequences in the form of employment restrictions for persons found to be “responsibly connected” with the violator.<sup>10</sup> Prior to 1962, the employment restrictions found in the Act were imposed on individuals connected with the violator “in any responsible position.”<sup>11</sup> 1962 amendments replaced the “in any responsible position” language with a “responsibly connected” provision. The term “responsibly connected” is currently defined as follows:

(9) The term “responsibly connected” means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 percentum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners. 7 U.S.C. §499a(9).

A second sentence was added to the provision by a 1995 amendment<sup>12</sup> and affords those who would otherwise fall within the

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<sup>10</sup> 7 U.S.C. §499h(b). Under the Act, PACA licensees may not employ, for at least one year, any person found “responsibly connected to any person whose license has been revoked or suspended, or who has been found to have committed any flagrant or repeated violation of 7 U.S.C. §499b.

<sup>11</sup> 7 U.S.C. §499h(b) (1958).

<sup>12</sup> Prior to the 1995 amendments to the PACA, the circuits were divided as to whether the presumption of §499a(b)(9) was irrebutable. Most adopted a per se rule. *See, e.g., Faour v. United States Dep’t of Agric.*, 985 F.2d 217, 220 (5<sup>th</sup> Cir. 1993); *Pupillo v.*

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statutory definition of “responsibly connected” an opportunity to demonstrate that they were not responsible for the violation. Extensive analysis of and comment upon the amendment has been made in a number of decisions, including *Michael Norinsberg v. United States Department of Agriculture and United States of America*, 162 F.3d 1194, 1196-1197 (D.C. Cir. 1998), 57 Agric. Dec. 1465, 1465-1467 (1998); *In re Lawrence D. Salin*, 57 Agric. Dec. 1474, 1482-1487 (1998); and *In re Michael J. Mendenhall*, 57 Agric. Dec. 1607, 1615-1619 (1998).

The amendment created a two-prong test for rebutting the statutory presumption of the first sentence:

...the first prong is that a petitioner must demonstrate by a preponderance of the evidence that petitioner was not actively involved in the activities resulting in a violation of the PACA. Since the statutory test is in the conjunctive (“and”), a failure to meet the first prong of the statutory test ends the test without recourse to the second prong. However, if a petitioner satisfies the first prong, then a petitioner must meet at least one of two alternatives: that a petitioner was only nominally a partner, officer or director, or shareholder of a violating licensee or entity subject to license which was the alter ego of its owners. *Salins*, 57 Agric. Dec. 1474, 1487-1488.

*Norinsberg* articulated the standard for the first prong as follows:

The standard is as follows: A petitioner who participates in activities resulting in a violation of the PACA is actively involved in those activities, unless the petitioner demonstrates by a preponderance of the evidence that his or her participation was limited to performance of ministerial functions only. Thus, if a petitioner demonstrates that he or she did not exercise judgment, discretion, or control with respect to the activities that resulted in a violation of PACA, the petitioner would not be found to have been actively involved in the activities that resulted in a

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*United States*, 755 F.2d 638, 643-44 (8<sup>th</sup> Cir. 1985); *Birkenfield v. United States*, 369 F.2d 491, 494 (3<sup>rd</sup> Cir. 1966); *Zwick v. Freeman*, 373 F.2d 110, 119 (2d Cir. 1967), *cert. denied*, 389 U.S. 835 (1967). The DC Circuit however had adopted a rebuttable presumption test. *See Quinn v. Butz*, 510 F.2d 743 (D.C. Cir. 1975), 34 Agric. Dec. 7 (1975); *Minotto v. United States Dep’t of Agric.*, 711 F.2d 406, 408 (DC Cir. 1983); *Martino v. United States Dep’t of Agric.*, 801 F.2d 1410, 1413 (DC Cir. 1986); *Veg-Mix, Inc. v. United States Dep’t of Agric.*, 832 F.2d 601, 611 (DC Cir. 1987); *Siegel v. Lyng*, 851 F.2d 412, 417 (DC Cir. 1988); *Bell v. Dep’t of Agric.*, 39 F.2d 1199, 1201 (DC Cir. 1994).



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violation of the PACA and would meet the first prong of the responsibly connected test. *Norinsberg*, 58 Agric. Dec. at 610-611.

This case accordingly turns upon whether the Petitioner met his burden of proof and rebutted the statutory presumption.

### Discussion

The Respondent argues that Shannon P. Casey is responsibly connected to TMI as the evidence established that the Petitioner was an officer and a share owner of more than 10 percent of the outstanding stock, thereby meeting the definition found in the first sentence of 7 U.S.C. §499a(9) and although he challenged the PACA Branch's determination that he was responsibly connected to TMI's violations of the PACA<sup>13</sup>, the evidence demonstrates that he cannot satisfy either prong of the statutory exception.<sup>14</sup>

If Casey had an actual, significant nexus to TMI, he cannot be regarded as a nominal officer or shareholder. *See In re Anthony L. Thomas*, 59 Agric. Dec. 367, 386 (2000) (discussing the "actual, significant nexus" standard under the nominal element of the test for responsible connection). Significantly, Casey's decision to pay some of TMI's vendors, but not others, before shutting the company down makes him actively involved in the activities that resulted in TMI's violations of the PACA. *See, Norinsberg*, 58 Agric. Dec. at 616 ("a petitioner who decides not to pay a produce seller in accordance with the PACA [is] actively involved in an actively resulting in a violation of the PACA."

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<sup>13</sup> Petitioner's May 10, 2011 e-mail filed with OALJ Hearing clerk as Document 8.

<sup>14</sup> To avoid responsible connection under the PACA, an officer, director or greater than 10 percent shareholder of a violating company must demonstrate by a preponderance of the evidence that they were not actively involved in the activities resulting in the violation of the PACA and that they were only nominally an officer, director, or shareholder of the violating company or that the company was the alter ego of its owners. The alter ego defense in the statute is inapplicable to this case because Casey was a stockholder of the violating entity. *See, e.g., In re Michael Norinsberg*, 58 Agric. Dec. 604, 609, n. 4 (1999) (finding that the *alter ego* defense was unavailable where the petitioner held a mere 2.97914 percent of the outstanding stock in the violating corporation); *In re Joseph T. Kocot*, 57 Agric. Dec. 1517, 1545 – 1546 (1998) (finding the *alter ego* defense unavailable to stockholder in a violating entity).

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It is also clear that Casey may not be considered an outsider who was enticed or coerced by an employer into a position that later rendered him responsibly connected. *See Martino*, 801 F.2d at 1414. Rather, he was an ambitious employee of TMI who contracted to incrementally purchase the company in 2006. *See RX-10*.<sup>15</sup> Upon entering the purchase agreement, Casey became an officer and 20 percent shareholder. *See RX-8*. In doing so, he “assumed the burdens imposed by the Act,” including the burden of being found responsibly. *See Martino*, 801 F.2d at 1414.

By the time that payments to produce suppliers were being delayed in violation of the PACA in late 2009, Casey owned 55 percent of TMI’s stock as a result of his payments under the purchase agreement. *See RX-36* at 3 (Casey bankruptcy schedules); *see also* Tr. at 102 (Wright). “Majority ownership obviously suffices [for a finding of responsible connection].” *See Veg-Mix*, 832 F.2d at 611. Individuals who own more than 20 percent of a violating company have not been considered nominal shareholders under the terms of the PACA. *See Bell*, 39 F.3d at 1202 (noting that in the case of such substantial shareholders “the likelihood of their being found ‘nominal’ was remote”).<sup>16</sup>

Although Casey’s voting rights were restricted under the purchase agreement that he entered with TMI’s former owners, the restriction was designed and intended to prevent him from abrogating the purchase and employment agreements that he entered with TMI’s former owners once he gained a majority stake in the company. There is no indication the restriction diminished his power and authority in any other way. The purchase agreement specified that Casey was to be treated as the owner of such stock for all other purposes and that he would have full voting rights once the full purchase price had been paid. *See RX-10* at 5. By

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<sup>15</sup> Casey’s prior experience at TMI supports the conclusion that his affiliation with the company was not nominal, as does his personal investment in TMI. *See Kocot*, 57 Agric. Dec. at 1543 - 1546.

<sup>16</sup> *See also, e.g., Martino*, 801 F.2d at 1414 (finding that ownership of 22.2 per centum of the stock in the violating company, along with the fact that no one coerced the petitioner into their position of power, was enough to support a finding of responsible connection); *Seigel*, 851 F.2d at 417 (noting that “approximately twenty per cent stock ownership would suffice to make a person accountable for not controlling delinquent management”); *Kocot*, 57 Agric. Dec. at 1544 (“ownership of approximately 20 per centum or more of the stock of a corporation is enough to support a finding of responsible connection”).

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2009, the company's former owners had ceased to have any involvement in TMI's day-to-day affairs. *See* RX-13 at 2.

"Responsibility [for corporate PACA violations] is placed upon corporate officers, directors, and holders of more than 10 per centum of the outstanding stock because their status with the company requires that they know, or should have known, about the violations being committed and that they be held responsible for their failure to 'counteract or obviate the fault of others.'" *See Thomas*, 59 Agric. Dec. at 386 (quoting *Bell*, 39 F.3d at 1201). In this case, Casey managed TMI's day-to-day operations as the *de facto* chief executive officer of the corporation. *See* RX-9 at 3.<sup>17</sup> Consistent with his position, he received the highest salary of any employee at TMI. *See* RX-30 – 32.<sup>18</sup> He hired and fired employees and signed agreements on behalf of TMI. *See* Tr. at 72 – 73, 79 – 80, 83 (Wright); RX-18; RX-9 at 2; RX-22 (credit agreement); RX-23 (lease).<sup>19</sup> Casey knew that payments to produce sellers were being delayed in violation of the PACA because he controlled TMI's bank accounts and signed the company's checks. *See* RX-30 – 32; Tr. at 72, 111 (Wright) ("all the checks were always written by Shannon, okayed by Shannon"). As has been noted in past cases, "the fact that a person signs corporate checks is considered one of the strongest indications of that person's close involvement in the financial affairs of the corporation." *See Kocot*, 57 Agric. Dec. at 1542; *Salins*, 57 Agric. Dec. at 1491.

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<sup>17</sup> As noted in the proposed findings of fact above, Casey represented that he was the president of TMI and the company's internet site at <http://www.tmipotatoes.com> showed him to be the president of the company despite the fact that the purchase agreement that he entered with TMI's former owners restricted him to the title of vice president. *See* RX-19 at 1; RX-22 at 2; RX-28 at 3; RX-17. Gerald Anderson, who actually held the title of president of TMI pursuant to the terms of the purchase agreement with Casey, "did very little for the business in 2007, less in 2008 and nothing in 2009." *See* RX-13 at 2.

<sup>18</sup> The fact that Casey's base salary was the highest in the company indicates that he was not a nominal officer of TMI. *See In re Lawrence D. Salins*, 57 Agric. Dec. 1474, 1495 (1998); *Kocot*, 57 Agric. Dec. at 1543; *In re Charles R. Brackett, et al.*, 64 Agric. Dec. 942, 960 (2005).

<sup>19</sup> The fact that Casey hired and fired employees and signed agreements as an officer of the company also weighs against any argument that his affiliation with TMI was merely nominal. *See Salins*, 57 Agric. Dec. at 1495; *Kocot*, 57 Agric. Dec. at 1542 - 1543; *Brackett*, 64 Agric. Dec. at 960.

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Starting in September of 2009, Casey intentionally delayed payments to TMI's suppliers in the Northwest and in a brief period of time had deposited more than one million dollars into an account other than TMI's operating account. *See* RX-37 – RX- 39; Tr. at 104 (Wright); 54 – 55 (Blake). In late December of 2009, Casey closed TMI's office in Albuquerque and terminated TMI's sales agent in the Northwest. *See* RX-18; RX-23; Tr. at 83 (Wright). Although Casey and his wife represented that TMI's unpaid creditors would be paid when the company's computer was operational again (*see* RX-18; RX-35), subsequent events made it clear that this was an attempt to obnubilate as they prepared to file for bankruptcy in an effort to cut off any personal liability for TMI's debts. *See* RX-20. By January 15, 2010, Casey and his wife had executed Chapter 7 bankruptcy declarations and their petition was filed on February 5, 2010. *See id.*

Based on the foregoing facts, it is clear that Casey had an actual, significant nexus with TMI and that his affiliation with the company as an officer and ownership of more than 10 percent of the company's stock was more than nominal. *See Thomas*, 59 Agric. Dec. at 386. He was also actively involved in the company's failure-to-pay violations of the PACA as a result of his control over TMI's day-to-day operations, including the company's payables and receivables. As the Judicial Officer noted in *Norinsberg*, 58 Agric. Dec. at 615:

“[I]f an individual, whose only activity on behalf of the corporation and only authority within the corporation is the payment of accounts payable, fails to pay a produce seller in accordance with the PACA, the individual [is] actively involved in an activity that resulted in a violation of the PACA.”

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

**Findings of Fact**

Tan-O-On Marketing Incorporated (“TMI”) is a Colorado corporation that engaged in the business of buying and selling potatoes in commerce in 2009. TMI operated from an office in Albuquerque, New Mexico and through an independent sales agent in Boise, Idaho. *See* RX-17. The company was licensed as a wholesale broker under the PACA until September 22, 2009. *See* RX-8 at 11.

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In 2006, Petitioner Casey entered a contract to purchase TMI from its former owners, Gerald and Julie Anderson. *See* RX-9-10. Casey agreed to pay the Andersons \$500,000 for the company over a ten year period. *See* RX-10. Monthly payments of \$5,000 were automatically withdrawn from TMI's operating account. *See* RX-31 (TMI operating account statement showing \$5,000 payment). In September of 2006, TMI notified the PACA Branch that Casey had purchased 20 percent of TMI's stock and was now an officer of the company. *See* RX-8 at 7 – 9; Tr. at 29 – 30 (Parker). After speaking with Casey, the PACA Branch modified TMI's PACA license certificate to reflect his new ownership stake in the company and his corporate office. *See* RX-8 at 7 - 8. He continued to be listed as an officer and greater than 10 percent shareholder until TMI failed to renew its license in 2009. *See id.* at 11; RX-34 at 1 (“Casey did not pay his PACA fee and allowed his PACA license to lapse”).

By the end of 2009, Casey owned 55 percent of TMI's stock. *See* RX-36 at 3; *see also* Tr. at 102 (Wright) (Casey informed Wright that he had a majority stake in the company). Pursuant to the purchase agreement that Casey entered with the Andersons for TMI, he was “treated as the owner of such stock for all purposes, except the power to vote such stock” which was retained by the Andersons until the full purchase price had been paid. *See* RX-10 at 5.

After contracting to buy TMI, Casey managed and controlled the company's day-to-day operations. *See* RX-9 at 3. Regardless of any restriction on his title under the stock purchase agreement (*see* RX-11 at 2), Casey functioned as the *de facto* chief executive officer of the company and represented that he was the president of the company. *See* RX-19 at 1; RX-22 at 2; RX-28 at 3; Tr. at 79 - 80. TMI's internet site at <http://www.tmipotatoes.com> showed him to be the president of the company. *See* RX-17. Gerald Anderson, who actually held the title of president of TMI pursuant to the terms of the purchase agreement, “did very little for the business in 2007, less in 2008 and nothing in 2009.” *See* RX-13 at 2.

Although Casey has maintained that he “held no authority to enter into or alter any commitments or contracts held by TMI,” the evidence of record is to the contrary. *See* RX-9 at 3. While managing and controlling TMI's day-to-operations as the *de facto* chief executive of the company, Casey entered and signed contracts on behalf of the company. *See* RX-22 (credit agreement); RX-23 (lease). Casey also cured

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delinquencies in TMI's corporate filings with the Colorado Secretary of State and changed the corporation's registered agent. *See* RX-16

Casey also hired and fired employees and contractors for TMI and paid their salaries. *See* RX-18; RX-9 at 2 ("I began to lay off staff"); Tr. at 72 – 73, 79 – 80, 83 (Wright).

At all times pertinent to the PACA violations by TMI, Casey controlled TMI's accounts payable and receivable, including payments from TMI's checking accounts. *See* RX-30 – 32; RX-37 – 39; Tr. at 72, 111 (Wright) ("all the checks were always written by Shannon, okayed by Shannon").

PACA Branch investigators contacted the creditors that were listed in Casey's bankruptcy schedules and obtained checks that had been made payable under his signature authority. *See* Tr. at 47 (Blake); RX-24; RX-25; RX-26; RX-27; *see also* RX-8 at 10 (PACA license check).

9. Although Casey employed a bookkeeper, he personally handled payments from TMI's accounts. *See* Tr. at 72, 111 (Wright); RX-30 – 32; RX-37 – 39.

10. Starting in the fall of 2009, Casey selectively left many of TMI's suppliers in the Northwest unpaid while he made large payments to other suppliers. *See* Tr. at 97 (Wright) (noting that his "suppliers were the ones that were not paid"). For example, while many of TMI's suppliers were being left unpaid, one vendor, Frenchman Valley, received large payments from Casey for \$83,739.50, \$109,761.60, and \$92,106.00 in September and October of 2009, and a \$254,695.85 wire transfer on November 16, 2009. *See* RX-30 at 3, 8; RX-31 at 8. Casey purportedly considered trying to merge TMI into Frenchmen Valley. *See* Tr. 96 (Wright).

11. Although Casey stated in documents filed with the PACA Branch that he "quit taking weekly salaries for [himself] and [his] wife in an effort to stimulate cash flow and ease the pressure" (*see* RX-9 at 2), the evidence clearly indicates that he continued to write checks to himself and his wife from TMI's operating account during the time period that payments to certain suppliers were being withheld in violation of the PACA. *See* RX-30 – 32.

12. Casey's base salary of roughly \$940.00 per week was the highest in the company. *See id.* Casey's wife also received roughly \$460.00 per week. *See id.* Another employee, possibly Gerald Anderson, received \$769.23 per week. *See id.*

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13. TMI's operating account bank statement for October of 2009 shows that Casey signed a check for \$460.81 payable to his wife on October 1st and another check payable to himself for \$940.13 on the same date. *See* RX-32 at 2. Two more withdrawals for \$460.81 were made from TMI's operating account on October 19th and 27th, in addition to a withdrawal for \$460.82 on October 14th. *See* RX-31 at 3. Three additional withdrawals in amounts matching Casey's weekly salary of \$940.13 were made from TMI's operating account on October 14th, 19th and 27th. *See id.* at 1, 3. The salary payments to Casey and his wife totalled \$5,603.77 in October of 2009.

14. TMI's operating account bank statement for November of 2009 shows that Casey signed a check for \$460.82 payable to his wife on November 19th and another for \$460.81 on November 25th. *See* RX-30 at 8. The statement also shows two additional withdrawals for \$460.81 on November 16th. *See id.* at 3. Casey also signed two checks payable to himself for \$940.13 on October 19th and 25th. *See id.* at 8. In addition, the account statement also shows three more payments of \$940.13 that were withdrawn on November 3rd and 16<sup>th</sup>. *See id.* at 3. The payments to Casey and his wife totalled \$6,543.90 in November of 2009.

15. By the fall of 2009, dissatisfied with the price that he was paying for TMI and the continued contractual obligation to pay a salary to the Andersons even though they had turned over their day-to-day functions to him, Casey attempted unsuccessfully to negotiate a reduced purchase price for TMI. *See* RX-9; RX-13; RX-33; RX-34.

16. His efforts rejected by the Andersons, Casey began to divert money away from TMI's operating account at the Bank of Albuquerque into a separate account at Sunflower Bank. *See* RX-37 – RX- 39; Tr. at 104 (Wright), 54 -55 (Blake).

17. In late 2009 and early 2010, Casey used the Sunflower account to pay more than \$1.3 million to one large potato grower in Colorado, Hi-Land Potato, and began telling people, sometimes in writing, that he was going to merge TMI with Hi-Land Potato. *See* RX-37 – RX- 39; RX-18.

18. After the bulk of the funds had been transferred to Hi-Land Potato, Casey closed TMI's office in Albuquerque, New Mexico in late December 2009 and terminated the company's sales agent in Idaho. *See* RX-18; RX-23; Tr. at 83 (Wright).

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19. Although Casey indicated that he had surrendered all TMI's records to the company's former owners (*see* RX-9 at 3), there is no evidence in the record to support this contention. In fact, until filing for bankruptcy, Casey and his wife told creditors that they were in possession of TMI's records and that everyone would be paid as soon as the computer was relocated and made operational again. *See* RX-18; RX-34 at 2; RX-35; Tr. at 98 (Wright).

20. While Casey and his wife were assuring TMI's creditors that they would be paid when the consolidation of TMI with Hi-Land Potato was complete (*see* RX-18; RX-35), they were actually preparing to file for bankruptcy to cut off any personal liability to the creditors. *See* RX-20; RX-36.

21. After filing for bankruptcy in early February of 2010, Casey's wife continued working for Hi-Land Potato, selling potatoes to TMI's former customers. *See* RX-18; RX-35; Tr. at 89 (Wright).

22. A number of TMI's unpaid produce suppliers filed formal reparation complaints with the Secretary of Agriculture and obtained Default Orders. *See* RX-1 –RX-6; RX-40 – RX-45.

23. Although the Secretary ordered TMI to make reparation to the suppliers, most of the judgments remain unpaid. *See* RX-1 – RX-6. One supplier was able to obtain payment directly from Hi-Land Potato. *See* Tr. at 93 – 94 (Wright).

24. As a result of the unpaid reparation awards against TMI, the PACA Branch began the process of seeking licensing and employment restrictions against the principals of record at TMI.

25. The agency determined that Casey was responsibly connected to TMI as an officer and significant shareholder when the company violated the PACA in October, November, and December of 2009. *See* RX-7; Tr. at 17 (Parker). An initial determination letter was sent to Casey's home address on July 29, 2010. *See* RX-7. Casey disputed the agency's initial determination and submitted documents in his defense. *See* RX-9.

26. After reviewing the materials that Casey submitted in response to the PACA Branch's initial determination letter, the Chief of the Branch issued a final determination that he was responsibly connected to TMI during the time period that the company violated the PACA by failing to pay its suppliers. *See* Agency Certified Record. The Chief's final determination letter was delivered to Casey's home address via Federal Express on December 28, 2010. *See id.*; Tr. at 19 (Parker).



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**Conclusions of Law**

1. The Secretary has jurisdiction in this matter.
2. Shannon P. Casey is an individual responsibly connected to TMI by virtue of his active significant nexus to and participation in corporate operations, including exclusive control over the corporate financial decisions which resulted in the company's failure to pay violations, the day-to-day operational control, his ownership of 55% of the shares of the corporation and his status as a corporate officer and *de facto* Chief Executive Officer of the corporation.
3. By virtue of being responsibly connected to a violating corporation, Casey is subject to the employment restrictions of the Act.

**Order**

1. The determination of the Chief of the PACA Branch that Shannon P. Casey was responsibly connected to TMI during the period of September of 2009 to December of 2009 that the corporation was committing willful, flagrant, and repeated violations of the Act is **AFFIRMED**.
  2. Shannon P. Casey is accordingly subject to the licensing restrictions and employment sanctions contained in Section 4(b) and 8(b) of the Act (7 U.S.C. §499d(b) and §499h(b)).
  3. This Decision and Order shall become final and effective without further proceedings thirty-five days (35) after service on Respondent, unless appealed to the Judicial Officer by a party to the proceeding within thirty (30) days, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).
- Copies of this Decision and Order will be served upon the parties by the Hearing Clerk.
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## PERISHABLE AGRICULTURAL COMMODITIES ACT

**KDLO ENTERPRISES, INC.**  
**PACA Docket No. D-09-0038.**  
**Decision and Order.**  
**Filed August 3, 2011.**

**PACA**

Charles Kendall, Esq. for AMS.  
Robert Radel, Esq. for Respondent.  
Initial Decision by Administrative Law Judge Jill S. Clifton.  
*Decision and Order by William Jenson, Judicial Officer*

**Decision and Order****PROCEDURAL HISTORY**

Robert C. Keeney, Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Deputy Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on December 2, 2008. The Deputy Administrator instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated under the PACA (7 C.F.R. pt. 46) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Deputy Administrator alleges, during the period October 2006 through June 2007, KDLO Enterprises, Inc. [hereinafter KDLO], failed to make full payment promptly of the agreed purchase prices to eight produce sellers in the total amount of \$450,621.77 for 33 lots of perishable agricultural commodities which KDLO purchased, received, and accepted in interstate commerce, in violation of 7 U.S.C. § 499b(4) and 7 C.F.R. § 46.2(aa) (Compl. ¶¶ III-IV). On February 27, 2009, KDLO filed a response to the Complaint in which KDLO denied the material allegations of the Complaint.

On August 3, 2010, the Deputy Administrator filed a Motion for Official Notice of Bankruptcy Pleadings and Motion for Decision without Hearing by Reason of Admissions [hereinafter Motion for Default Decision]. On September 22, 2010, KDLO filed a response to

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the Deputy Administrator's Motion for Default Decision; on October 13, 2010, KDLO supplemented its response to the Deputy Administrator's Motion for Default Decision; and on November 5, 2010, the Deputy Administrator filed a reply in support of his Motion for Default Decision.

On December 30, 2010, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued a Decision and Order by Reason of Admissions in which the ALJ: (1) granted the Deputy Administrator's Motion for Default Decision; (2) found, during the period October 2006 through June 2007, KDLO failed to make full payment promptly to seven of the eight produce sellers listed in the Complaint of the agreed purchase prices, or balance of those prices, in the amount of \$348,026.18 for 28 lots of perishable agricultural commodities which KDLO purchased, received, and accepted in interstate commerce; (3) concluded KDLO willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4); and (4) ordered publication of the facts and circumstances of KDLO's PACA violations.

On March 7, 2011, KDLO appealed to, and requested oral argument before, the Judicial Officer. On March 25, 2011, the Deputy Administrator filed a Response to the Appeal Petition. On April 1, 2011, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision. Based upon careful consideration of the record, I affirm the ALJ's December 30, 2010, Decision and Order by Reason of Admissions, and, with minor changes, I adopt the ALJ's December 30, 2010, Decision and Order by Reason of Admissions as the final Decision and Order.

## **DECISION**

### **Discussion**

The PACA requires licensed produce dealers to make full payment promptly for fruit and vegetable purchases, usually within 10 days of acceptance, unless the parties agreed to different terms prior to the purchase (7 U.S.C. § 499b(4); 7 C.F.R. § 46.2(aa)(5), (11)).

The ALJ took official notice of the filings in *In re Pederson*, Case No. 09-45837-PHB (Bankr. W.D. Wash. Nov. 18, 2009), a bankruptcy proceeding involving joint debtors, Kevin M. Pederson and Donna M. Pederson. The bankruptcy filings include KDLO as a "fdba" (formerly doing business as) of Mr. Pederson and identify Mr. Pederson as formerly operating under the trade name "KDLO Enterprises, Inc." In

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Schedule F - Creditors Holding Unsecured Nonpriority Claims, Mr. and Mrs. Pederson admit that they owed \$422,518.18 to the eight produce sellers listed in the Complaint, and that \$348,026.18 of that amount was undisputed. KDLO is a corporation, and Mr. and Mrs. Pederson are individuals; nevertheless, in these circumstances, Mr. and Mrs. Pederson's admissions in *In re Pederson*, Case No. 09-45837-PHB (Bankr. W.D. Wash. Nov. 18, 2009), suffice to admit the material allegations in the Complaint for KDLO.

A comparison of the Complaint with Schedule F - Creditors Holding Unsecured Nonpriority Claims shows the following:

Produce Seller	Amount Alleged in the Complaint	Amount Admitted in Bankruptcy Schedule F
California Oregon Seed, Inc.	\$4,216	\$4,216
Sunkist Growers	\$74,492.50	\$74,492
Gold Digger Apples	22,848.50	\$21,808
Evans Fruit	\$251,425.30	\$250,000
Salyer American Foods	\$8,063.50	\$7,447.50
Manson Growers Cooperative	\$43,692.47	\$18,000
C.M. Holzinger Fruit Co. (Holtzinger Fruit Co.)	\$37,098.50	\$38,141.50
Sterling Export	\$8,785	\$8,413.18
TOTALS:	\$450,621.77	\$422,518.18

(Motion for Default Decision, Ex. A at 21, 24, 26, 28, 31.) Schedule F - Creditors Holding Unsecured Nonpriority Claims indicates that the amounts are undisputed with seven of the eight produce sellers; the amount of \$74,492 owed to Sunkist Growers was the only debt listed as disputed on Schedule F - Creditors Holding Unsecured Nonpriority Claims (Motion for Default Decision, Ex. A at 31). Mr. and Mrs. Pederson received a full discharge of these debts, as indicated in the Discharge of Debtor, *In re Pederson*, Case No. 09-45837-PHB

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(Bankr. W.D. Wash. Nov. 18, 2009) (Motion for Default Decision, Ex. B at 1).

The United States Department of Agriculture's policy in cases in which PACA licensees have failed to make full or prompt payment for produce is, as follows:

In any PACA disciplinary proceeding in which it is alleged that a respondent has failed to pay in accordance with the PACA and respondent admits the material allegations in the complaint and makes no assertion that the respondent has achieved full compliance or will achieve full compliance with the PACA within 120 days after the complaint was served on the respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "no-pay" case. In any "no-pay" case in which the violations are flagrant or repeated, the license of a PACA licensee, shown to have violated the payment provisions of the PACA, will be revoked.

*In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 549 (1998).

The Hearing Clerk served the Complaint on KDLO on December 11, 2008.<sup>1</sup> KDLO cannot show full compliance with the PACA within 120 days after having been served with the Complaint. KDLO's inability to show full compliance with the PACA within 120 days of having been served with the Complaint makes this a "no-pay" case. The appropriate sanction in a "no-pay" case in which the violations are flagrant or repeated is license revocation. A civil penalty is not appropriate because "limiting participation in the perishable agricultural commodities industry to financially responsible persons is one of the primary goals of the PACA," and it would not be consistent with the congressional intent to require a PACA violator to pay the United States while produce sellers are left unpaid. *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 570-71 (1998).

KDLO's violations are "repeated" because repeated means more than one. KDLO's violations are "flagrant" because of the number of violations, the amount of money involved, and the lengthy time period during which the violations occurred. *See In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895 (1997). KDLO's violations of the PACA are also "willful," as that term is used in the Administrative

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<sup>1</sup>United States Postal Service Domestic Return Receipt for article number 7004 2510 0003 7022 8258.

## PERISHABLE AGRICULTURAL COMMODITIES ACT

Procedure Act (5 U.S.C. § 558(c)).<sup>2</sup> Willfulness is reflected by KDLO's violations of express requirements of the PACA (7 U.S.C. § 499b(4)) and the Regulations (7 C.F.R. § 46.2(aa)) and in the length of time during which KDLO committed the violations and the number and dollar amount of KDLO's violative transactions.

**Findings of Fact**

1. KDLO is a corporation incorporated and existing under the laws of the State of Washington. KDLO's business and mailing addresses are in Gig Harbor, Washington.

2. Pursuant to the licensing provisions of the PACA, KDLO was issued license number 1998-1922 on September 8, 1998. Pursuant to 7 U.S.C. § 499d(a), KDLO's PACA license terminated on September 8, 2008, when KDLO failed to pay the annual renewal fee.

3. KDLO, during the period October 2006 through June 2007, failed to make full payment promptly to seven of the eight produce sellers listed in the Complaint of the agreed purchase prices, or the balance of those prices, in the amount of \$348,026.18 for 28 lots of perishable agricultural commodities which KDLO purchased, received, and accepted in interstate commerce.

4. The Hearing Clerk served the Complaint on KDLO on December 11, 2008. KDLO cannot show full compliance with the PACA within 120 days after having been served with the Complaint. KDLO's inability to show full compliance with the PACA within 120 days of having been served with the Complaint makes this a "no-pay" case.

**Conclusions of Law**

1. The Secretary of Agriculture has jurisdiction over KDLO and the subject matter involved in the instant proceeding.

2. KDLO willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4), during the period October 2006 through June 2007, by failing to make full payment promptly to seven produce sellers of the agreed

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<sup>2</sup> A violation is willful under the Administrative Procedure Act if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements. *See, e.g., Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983).

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purchases prices, or the balance of those prices, in the amount of \$348,026.18 for 28 lots of perishable agricultural commodities which KDLO purchased, received, and accepted in interstate commerce.

3. The appropriate sanction for KDLO, since KDLO no longer has a PACA license, is publication of the facts and circumstances of KDLO's violations of the PACA.

### **KDLO's Request for Oral Argument**

KDLO's request for oral argument before the Judicial Officer (Appeal Pet. at 2 ¶ 5), which the Judicial Officer may grant, refuse, or limit,<sup>3</sup> is refused because the issues have been fully briefed by the parties and oral argument would serve no useful purpose.

### **KDLO's Appeal Petition**

KDLO raises four issues in its Appeal Petition. First, KDLO contends the ALJ erroneously denied KDLO the opportunity for hearing, in violation of the Due Process Clause of the Fifth Amendment to the Constitution of the United States (Appeal Pet. at 1 ¶ 1).

The Administrative Procedure Act authorizes official notice in adjudicative proceedings<sup>4</sup> and the Rules of Practice provide that official notice may be taken of such matters as are judicially noticed by the courts of the United States and of any other matter of technical, scientific, or commercial fact of established character.<sup>5</sup> Federal courts may take judicial notice of proceedings in other courts if those proceedings have a direct relation to matters at issue.<sup>6</sup> Therefore, under 7 C.F.R. § 1.141(h)(6), an administrative law judge presiding over a PACA disciplinary proceeding may take official notice of proceedings in a

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<sup>3</sup> 7 C.F.R. § 1.145(d).

<sup>4</sup> 5 U.S.C. § 556(e).

<sup>5</sup> 7 C.F.R. § 1.141(h)(6).

<sup>6</sup> Duckett v. Godinez, 67 F.3d 734, 741 (9th Cir. 1995), cert. denied, 517 U.S. 1158 (1996); United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992); Veg-Mix, Inc. v. U.S. Dep't of Agric., 832 F.2d 601, 607 (D.C. Cir. 1987).

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United States bankruptcy court that have a direct relation to the PACA disciplinary proceeding. Documents filed in bankruptcy proceedings that have a direct relation to matters at issue in PACA disciplinary proceedings have long been officially noticed in PACA disciplinary proceedings.<sup>7</sup> The documents filed in *In re Pederson*, Case No. 09-45837-PHB (Bankr. W.D. Wash. Nov. 18, 2009), have a direct relation to the matters at issue in the instant proceeding. Therefore, I conclude the ALJ properly took official notice of the filings in *In re Pederson*, Case No. 09-45837-PHB (Bankr. W.D. Wash. Nov. 18, 2009).

The Rules of Practice set forth the procedure to be followed when a respondent admits the material allegations of fact contained in the complaint. As KDLO has admitted the material allegations of fact in the Complaint, there are no issues of fact on which a meaningful hearing could be held in the instant proceeding, and the ALJ properly issued the December 30, 2010, Decision and Order by Reason of Admissions under the default provisions in the Rules of Practice (7 C.F.R. § 1.139). The application of the default provisions in the Rules of Practice do not deprive KDLO of its rights under the Due Process Clause of the Fifth Amendment to the Constitution of the United States.<sup>8</sup>

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<sup>7</sup> *In re Judith's Fine Foods Int'l, Inc.*, 66 Agric. Dec. 758, 764 (2007); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 827, 893 (1997); *In re S W F Produce Co.*, 54 Agric. Dec. 693 (1995); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1609 (1993); *In re Allsweet Produce Co.*, 51 Agric. Dec. 1455, 1457 n.1 (1992); *In re Magnolia Fruit & Produce Co.*, 49 Agric. Dec. 1156, 1158 (1990), *aff'd*, 930 F.2d 916 (5th Cir. 1991) (Table), printed in 50 Agric. Dec. 854 (1991); *In re The Caito Produce Co.*, 48 Agric. Dec. 602, 627 (1989); *In re Roman Crest Fruit, Inc.*, 46 Agric. Dec. 612, 615 (1987); *In re Anthony Tammara, Inc.*, 46 Agric. Dec. 173, 175-76 (1987); *In re Walter Gailey & Sons, Inc.*, 45 Agric. Dec. 729, 731 (1986); *In re B.G. Sales Co.*, 44 Agric. Dec. 2021, 2024 (1985); *In re Kaplan's Fruit & Produce Co.*, 44 Agric. Dec. 2016, 2018 (1985); *In re A. Pellegrino & Sons, Inc.*, 44 Agric. Dec. 1602, 1606 (1985), appeal dismissed, No. 85-1590 (D.C. Cir. Sept. 29, 1986); *In re Veg-Mix, Inc.*, 44 Agric. Dec. 1583, 1587 (1985), *aff'd* and remanded, 832 F.2d 601 (D.C. Cir. 1987), remanded, 47 Agric. Dec. 1486 (1988), final decision, 48 Agric. Dec. 595 (1989).

<sup>8</sup> *See United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding a hearing was not required under the Fifth Amendment to the Constitution of the United States where the respondent was notified that failure to deny the allegations of the complaint would constitute an admission of those allegations under the Rules of Practice and the respondent failed to specifically deny the allegations). *See also Father & Sons Lumber and Building Supplies, Inc. v. NLRB*, 931 F.2d 1093, 1096 (6th Cir. 1991) (stating due process generally does not entitle parties to an evidentiary hearing where the National Labor Relations Board has properly determined that a default summary



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Second, KDLO asserts the issue in the instant proceeding has been previously litigated in *Evans Fruit Co. v. KDLO Enterprises, Inc.*, No. C07-5301RBL (W.D. Wash. Oct. 9, 2007), and in *In re Pederson*, Case No. 09-45837-PHB (Bankr. W.D. Wash. Nov. 18, 2009). KDLO contends, in light of this previous litigation, the instant administrative proceeding subjects KDLO to double jeopardy, in violation of the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States. (Appeal Pet. at 1 ¶ 2.)

The Double Jeopardy Clause provides that no “person [shall] be subject for the same offence to be twice put in jeopardy of life or limb[.]” (U.S. Const. amend. V.) The Double Jeopardy Clause protects against successive punishments for the same criminal offense.<sup>9</sup> Neither *Evans Fruit Co. v. KDLO Enterprises, Inc.*, No. C07-5301RBL (W.D. Wash. Oct. 9, 2007), nor *In re Pederson*, Case No. 09-45837-PHB (Bankr. W.D. Wash. Nov. 18, 2009), was a criminal proceeding that resulted in KDLO’s punishment. Moreover, the instant disciplinary administrative proceeding is not a criminal proceeding.<sup>10</sup> Therefore, jeopardy attaches neither to the proceedings referenced by KDLO in its Appeal Petition nor

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judgment is appropriate due to a party’s failure to file a timely response); *Kirk v. INS*, 927 F.2d 1106, 1108 (9th Cir. 1991) (rejecting the contention that the administrative law judge erred by issuing a default judgment based on a party’s failure to file a timely answer).

<sup>9</sup>*Hudson v. United States*, 522 U.S. 93, 98-99 (1997); *United States v. Dixon*, 509 U.S. 688, 696 (1993); *Oregon v. Kennedy*, 456 U.S. 667, 671 (1982); *United States v. Dintz*, 424 U.S. 600, 606 (1976); *Breed v. Jones*, 421 U.S. 519, 528 (1975); *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 235-36 (1972); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 548-49 (1943); *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938).

<sup>10</sup>*In re Field Market Produce, Inc.* (Order Denying Late Appeal), 55 Agric. Dec. 1418, 1432 (1996) (holding a disciplinary administrative proceeding instituted under the PACA is not a criminal proceeding). See generally *United States v. Bizzell*, 921 F.2d 263, 266 (10th Cir. 1990) (stating administrative proceedings in which defendants were debarred from Department of Housing and Urban Development programs were not prosecutions within the meaning of the Double Jeopardy Clause); *In re Terry Horton*, 50 Agric. Dec. 430, 440 (1991) (stating double jeopardy is not applicable to administrative proceedings for the assessment of a civil monetary penalty); *In re Leonard McDaniel*, 45 Agric. Dec. 2255, 2264 (1986) (stating an administrative proceeding to assess a civil monetary penalty is civil in nature and not subject to the Double Jeopardy Clause).

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to the instant proceeding, and the Double Jeopardy Clause cannot be interposed to bar the instant proceeding.

Third, KDLO contends the employment sanction as applied to Mr. Pederson is too severe and deprives Mr. Pederson of his right to work and provide for his family (Appeal Pet. at 1 ¶ 3).

Mr. Pederson is not a party to the instant proceeding, and no employment sanction is imposed on Mr. Pederson in the instant proceeding. Moreover, any employment restriction on Mr. Pederson which may result from the disposition of the instant proceeding is irrelevant to the disposition of the instant proceeding. Therefore, I decline to address KDLO's contention regarding the severity of any employment restriction imposed on Mr. Pederson.

Fourth, KDLO contends the Deputy Administrator should not have filed the Complaint because Evans Fruit Company was not eligible for trust protection under the PACA (Appeal Pet. at 2 ¶ 4).

KDLO cites no basis for its contention that, as a condition of the Deputy Administrator's filing a complaint against a respondent that has allegedly violated the prompt payment provisions of 7 U.S.C. § 499b(4), all of the alleged unpaid produce sellers must be eligible for trust protection under the PACA. I cannot locate any provision of the PACA or the Rules of Practice that supports KDLO's contention; therefore, I reject KDLO's contention that the Deputy Administrator should not have filed the Complaint.

**ORDER**

KDLO has committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)). The facts and circumstances of KDLO's violations of the PACA shall be published. The publication of the facts and circumstances of KDLO's violations of the PACA shall be effective 60 days after service of this Order on KDLO.

**RIGHT TO JUDICIAL REVIEW**

KDLO has the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. § 2341-2350. Judicial review must be sought within 60 days after entry of the Order in this Decision and

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Order.<sup>1</sup> The date of entry of the Order in this Decision and Order is August 3, 2011.

Done at Washington, DC

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**LENNY PERRY'S PRODUCE, INC.**  
**PACA Docket No. 10-0232.**  
**Decision and Order.**  
**Filed December 16, 2011.**

**PACA**

Charles Kendall, Esq for AMS  
Robert Radel, Esq. for Respondent.  
*Decision and Order by Administrative Law Judge Jill S. Clifton.*

**On the Written Record**

1. The Complaint, filed on April 15, 2010, initiated a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §499a -§499t) (herein frequently the "PACA").

**Decision Summary**

**Parties and Allegations**

2. The Complainant is the Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture (herein frequently "AMS" or "Complainant").

3. The Respondent is Lenny Perry's Produce, Inc., a corporation registered in the State of New York.

4. The Complaint alleges that the Respondent, Lenny Perry's Produce, Inc. (herein frequently "Lenny Perry's Produce" or "Respondent"), violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), by failing to pay 30 produce sellers for \$534,645.19 in produce purchases during 2007-2008, as more particularly described in Appendix

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<sup>1</sup> 28 U.S.C. § 2344.

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A to the Complaint. The Complaint alleges that Lenny Perry's Produce willfully, flagrantly, and repeatedly violated Section 2(4) of the PACA. 7 U.S.C. § 499b(4).

5. On behalf of Respondent Lenny Perry's Produce, Inc., which ceased business operations in October 2008, its counsel, Robert R. Radel, Esq., filed a response to the Complaint on May 13, 2010, asserting among other things that all proceedings against Lenny Perry's Produce are stayed by bankruptcy proceedings and the order entered in September 2009 by a United States District Judge for the Western District of New York.

**Discussion**

6. AMS filed, on October 14, 2011, a Motion entitled "Complainant's Motion for a Decision Without Hearing by Reason of Default or for an Order Requiring Respondent to Show Cause Why a Decision Without Hearing Should Not be Issued." *See* 7 C.F.R. § 1.139. Lenny Perry's Produce responded to AMS's Motion on November 1, 2011. Complainant's Reply was filed on December 9, 2011.

7. Counsel for Lenny Perry's Produce, Robert R. Radel, Esq., has fought valiantly for the status quo in this case. Mr. Radel insists that any determination I would now make should not be made, because the number of PACA creditors and the amount of PACA claims will be determined elsewhere, in the U.S. District Court. Mr. Radel states, "The purpose of the Respondent's corporate chapter 7 bankruptcy filing was to provide a process and procedure for the submission of claims, the liquidation of assets, and the payment of claims, specifically including any PACA claims." *See* Response, filed November 1, 2011 by Lenny Perry's Produce. [Mr. Radel represents Lenny Perry's Produce not only here, but also in the bankruptcy. Mr. Radel makes clear that at the time of filing bankruptcy, Lenny Perry's Produce had assets and accounts receivable worth \$435,532.96.] Among the defenses raised in the response to the Complaint filed on May 13, 2010, Mr. Radel included:

"Some or all of the sellers listed in Appendix A to the Complaint never provided the commodities listed therein" and

"The allegations in the Complaint are barred, in part or in whole, by release, payment, modification, and/ or award as to some or all of the sellers listed in Appendix A of the Complaint".

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8. I see Mr. Radel's point. What I have determined to do here, is to distinguish, among the claims from the Schedule F submitted by Lenny Perry's Produce in bankruptcy, those that match Appendix A attached to the Complaint, that show **no Setoff** to the claim, and that do **not** show "Disputed" in the appropriate column. These are the claims that are admitted, in Lenny Perry's Produce's Schedule F; *see* paragraph 18 for the bolded, underlined dollar amounts. What I decide here has no impact on the work being done in the U.S. District Court and in bankruptcy. Whether any of the produce sellers in Appendix A attached to the Complaint is eventually paid-in-full; or any is eventually paid nothing, my decision here would not change; consequently there is no reason for me to wait to decide. Upon careful consideration, AMS's Motion is granted in part, and I issue this Decision and Order on the Written Record without further hearing or procedure.

9. Section 2(4) of the PACA requires licensed produce dealers to make "full payment promptly" for fruit and vegetable purchases, usually within ten days of acceptance, unless the parties agreed to different terms prior to the purchase. *See* 7 U.S.C. § 499b(4).<sup>2</sup> A respondent in an administrative proceeding does not have a right to an oral hearing under all circumstances, and an agency may dispense with a hearing when there is no material issue of fact on which a meaningful hearing can be held." *See In re: H. Schnell & Company, Inc.*, 57 Agric. Dec. 1722, 1729 (1998).<sup>3</sup>

10. The Department's policy in cases where PACA licensees have failed to make full or prompt payment for produce is straightforward:

In any PACA disciplinary proceeding in which it is alleged that a respondent has failed to pay in accordance with the PACA and respondent admits the material allegations in the complaint and makes no assertion that the respondent has achieved full compliance or will achieve full compliance with the PACA within 120 days after the complaint was served on the respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "no-pay" case. In any "no-pay" case in which the violations are flagrant or repeated, the license of a PACA licensee, shown to have violated the payment provisions of the PACA, will be revoked.

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<sup>2</sup> *See also* 7 C.F.R. § 46.2(aa)(5) and (11) (defining "full payment promptly").

<sup>3</sup> *See also, In re: Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 894 (1997) (decision without hearing by reason of admissions).

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*In re: Scamcorp, Inc.*, 57 Agric. Dec. 527, 549 (1998).

11. Lenny Perry's Produce's inability to assert that it has achieved full compliance with the PACA within 120 days<sup>4</sup> of having been served with the Complaint makes this a "no-pay" case. *See Scamcorp*, 57 Agric. Dec. at 549. The appropriate sanction in a "no-pay" case where the violations are flagrant and repeated is license revocation. *See id.* A civil penalty is not appropriate because "limiting participation in the perishable agricultural commodities industry to financially responsible persons is one of the primary goals of the PACA", and it would not be consistent with the Congressional intent to require a PACA violator to pay the Government while produce sellers are left unpaid. *See id.*, at 570-71.

12. Lenny Perry's Produce intentionally, or with careless disregard for the payment requirements in section 2(4) of the PACA, "shifted the risk of nonpayment to sellers of the perishable agricultural commodities." *See id.*, at 553.

13. Where there is no longer a valid license to revoke, the appropriate sanction in lieu of revocation is a finding of willful, flagrant and repeated violations of the PACA and publication of the facts and circumstances of the violations. *See In re: Furr's Supermarkets Inc.*, 62 Agric. Dec. 385, 386-387 (2003).

### Findings of Fact

14. Lenny Perry's Produce, Inc. (Respondent) is a corporation registered in the State of New York, which ceased business operations in October 2008.

15. The mailing address of Lenny Perry's Produce, Inc. is in care of its counsel, Robert R. Radel, Esq., Buffalo, NY.

16. Pursuant to the licensing provisions of the PACA, Lenny Perry's Produce, Inc. was issued license number 20040735 on April 29, 2004; the license terminated on April 29, 2009.

17. Official notice is taken of docket entry 16 in bankruptcy case 1-09-10297, in the United States Bankruptcy Court for the Western District

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<sup>4</sup> The Complaint was served April 19, 2010; to this day (in December 2011), undisputed claims remain undecided and unpaid, of fruit and vegetable sellers listed as creditors in Lenny Perry's Produce's bankruptcy. *See* Schedule F, attached to Complainant's Reply filed December 9, 2011.

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of New York, a true and correct copy of which is attached to Complainant's Reply filed December 9, 2011.

18. In its bankruptcy filing on May 4, 2009, Lenny Perry's Produce, Inc. admitted<sup>5</sup> that it had not paid:

(1) **\$3,000.00** that it had owed to "J&J Produce", Loxahatchee, FL, since 2007. This, more probably than not, is item 1 of Appendix A attached to the Complaint, concerning mixed vegetables, bought from the produce seller "J & J Produce, Inc.", Loxahatchee, FL.

(2) **\$37,466.00** that it had owed to "Red Isle Produce Co. Ltd., Charlottetown, PEI C1E 2A1, Canada", since 2008. This, more probably than not, is item 2 of Appendix A attached to the Complaint, concerning potatoes, bought from the produce seller "Red Isle Produce Co. LTD, Charlottetown, PE, CN".

(3) **\$23,713.37** that it had owed to "Shipping Point Marketing", Phoenix, AZ, since 2008. This, more probably than not, is item 3 of Appendix A attached to the Complaint, concerning mixed vegetables, bought from "Shipping Point Marketing, Inc.", Phoenix, AZ.

(4) **\$3,766.75** that it had owed to "Thruway Produce of Florida", Deerfield Beach, Florida, since 2008. This, more probably than not, is item 4 of Appendix A attached to the Complaint, concerning mixed vegetables, bought from "Thruway Produce of Florida, Inc.", Deerfield Beach, FL.

(5) **\$29,298.36** that it had owed to Eagle Fruit Traders LLC, Wilmington, MA, since 2008. This is item 5 of Appendix A attached to the Complaint, concerning mixed fruit.

(6) \$7,246.00 claimed by I Love Produce LLC, Kelton, PA, incurred 2008. This is item 6 of Appendix A attached to the Complaint, concerning mixed vegetables. THIS CLAIM IS DISPUTED (Schedule F).

(7) **\$2,200.00** that it had owed to Nash Produce Company, Inc., Nashville, NC, since 2008. This is item 7 of Appendix A attached to the Complaint, concerning sweet potatoes.

(8) \$5,261.45 claimed by Crown Harvest Produce Sales LLC, Plant City, FL, incurred 2008. This is item 8 of Appendix A attached to the Complaint, concerning mixed fruit and vegetables. THIS CLAIM IS DISPUTED (Schedule F).

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<sup>5</sup> See Schedule F, attached to Complainant's Reply filed December 9, 2011.

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(9) \$3,951.00 that it had owed to Wendell Roberson Farms, Tifton, GA, since 2008. This, more probably than not, is item 9 of Appendix A attached to the Complaint, concerning mixed vegetables, bought from "Wendell Roberson Farms, Inc.", Tifton, GA.

(10) \$13,652.50 that it had owed to "Exeter Produce, Exeter, Ontario N0M 1S3 Canada", since 2008. This, more probably than not, is item 10 of Appendix A attached to the Complaint, concerning mixed vegetables, bought from "Exeter Produce & Storage Co. LTD, Ontario, CN".

(11) \$5,999.30 that it had owed to Syracuse Banana, Syracuse, NY, since 2008. This, more probably than not, includes the \$4,428.50 in item 11 of Appendix A attached to the Complaint, concerning mixed fruit and vegetables.

(12) \$2,800.00 that it had owed to "Brooks Tropicals Inc.", Homestead FL, since 2008. This, more probably than not, is item 12 of Appendix A attached to the Complaint, concerning mixed vegetables, bought from the produce seller "Brooks Tropical LLC", Homestead, FL.

(13) \$56,000.00 claimed by Weis-Buy Farms, Inc., Fort Myers, FL, incurred 2008. This is item 13 of Appendix A attached to the Complaint, concerning mixed vegetables. THIS CLAIM IS DISPUTED (Schedule F).

(14) \$4,843.70 claimed by "Pismo Oceano Vegetable Exchange", Oceano, CA, incurred 2008. This, more probably than not, is item 14 of Appendix A attached to the Complaint, concerning mixed vegetables, bought from the produce seller "Prismo-Oceano (sic) Vegetable Exchange", Oceano, CA. THIS CLAIM IS DISPUTED (Schedule F).

(15) \$34,474.38 claimed by Dean Tucker Farms Produce Inc., Sumner, GA, incurred 2008. This is item 15 of Appendix A attached to the Complaint, concerning mixed fruit. THIS CLAIM IS DISPUTED (Schedule F).

(16) \$21,871.50 that it had owed to Burch Farms, Faison, NC, since 2008. This is item 16 of Appendix A attached to the Complaint, concerning mixed vegetables.

(17) \$6,652.60 claimed by Pioneer Growers Cooperative, Belle Glade, FL, incurred 2008. This is item 17 of Appendix A attached to the Complaint, concerning mixed vegetables. THIS CLAIM IS DISPUTED (Schedule F).

(18) \$117,021.25 claimed by John B. Ordille, Inc., Hammonton, NJ, since 2008. This is item 18 of Appendix A attached to the Complaint,



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concerning mixed fruit and vegetables. THIS CLAIM IS DISPUTED (Schedule F).

(19) **\$2,120.00** that it had owed to Wilson Family Farm, LTD, Saint Augustine, FL, since 2007 (or 2008). This is item 19 of Appendix A attached to the Complaint, concerning potatoes.

(20) \$640.00 claimed by McDaniel Fruit Co., Fallbrook, CA, incurred 2008. This is item 20 of Appendix A attached to the Complaint, concerning avocados. THIS CLAIM IS DISPUTED (Schedule F).

(21) **\$14,602.50** that it had owed to Kenneth Alexander Produce Sales, LLC, Vardaman, MS, since 2008. This is item 21 of Appendix A attached to the Complaint, concerning potatoes.

(22) \$45,557.42 claimed by "Jackson's Farming Company", Autryville, NC, incurred 2008. This, more probably than not, is item 22 of Appendix A attached to the Complaint, concerning mixed fruit, bought from the produce seller "Jackson Farming Co.", Autryville, NC. THIS CLAIM IS DISPUTED (Schedule F).

(23) **\$33,931.75** that it had owed to "Pier 27, Holland Landing, Ontario L9N 1P6, Canada", since 2008. This, more probably than not, is item 23 of Appendix A attached to the Complaint, concerning mixed vegetables, bought from the produce seller "Pier 27 Produce, Ontario, CN".

(24) **\$2,407.00** that it had owed to "Fortune Growers", Hoffman Estates, IL, since 2008. This, more probably than not, is item 24 of Appendix A attached to the Complaint, concerning mixed vegetables, bought from the produce seller "Fortune Growers, LLC", Hoffman Estates, IL.

(25) **\$875.00** that it had owed to "Turlock Fruit", Turlock, CA, since 2008. This, more probably than not, is item 25 of Appendix A attached to the Complaint, concerning honeydews, bought from the produce seller "Turlock Fruit Co.", Turlock, CA.

(26) **\$17,767.25** that it had owed to Centre Maraicher, Sainte Clotilde Quebec J0L 1N0 Canada, since 2008. This is item 26 of Appendix A attached to the Complaint, concerning mixed fruit & vegetables.

(27) **\$26,636.00** that it had owed to "Wings Landing Farms, Preston, MD, since 2008. This, more probably than not, is item 27 of Appendix A attached to the Complaint, concerning mixed fruit, bought from the produce seller "Wings Landings Farms", Preston, MD.

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(28) **\$7,878.91** that it had owed to Frank Minardo Inc., Mesa AZ, since 2008. This is item 28 of Appendix A attached to the Complaint, concerning mixed fruit and vegetables.

(29) \$3,985.00 claimed by "Top Trellis", North East, PA, incurred 2008. This, more probably than not, is item 29 of Appendix A attached to the Complaint, concerning grapes, bought from the produce seller "Top Trellis, Inc.", North East, PA. THIS CLAIM IS DISPUTED (Schedule F).

(30) \$997.00 claimed by James Desiderio Inc., Buffalo, NY, incurred 2008. This, more probably than not, includes the \$597.00 in item 30 of Appendix A attached to the Complaint, concerning mixed fruit & vegetables. THIS CLAIM IS DISPUTED (Schedule F).

19. Of the 30 entries in paragraph 18, the 11 DISPUTED claims are, with respect to this proceeding only, dismissed with prejudice. The 19 remaining entries, for which Respondent Lenny Perry's Produce, Inc. has admitted liability in its bankruptcy filings, prove that Lenny Perry's Produce, Inc. failed to make full payment promptly to 19 of the 30 produce sellers listed in paragraph III of the Complaint (referencing Appendix A), for \$252,366.39 of perishable agricultural commodities that Lenny Perry's Produce purchased, received, and accepted in the course of interstate and foreign commerce in 2007 and 2008.

### Conclusions

20. The Secretary of Agriculture has jurisdiction over Lenny Perry's Produce, Inc. and the subject matter involved herein.

21. Lenny Perry's Produce, Inc. willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), during 2007 and 2008, by failing to make full payment promptly of the purchase prices, or balances thereof, for \$252,366.39 in fruits and vegetables, all being perishable agricultural commodities, that Lenny Perry's Produce, Inc. purchased, received, and accepted in the course of interstate and foreign commerce.

### Order

22. Lenny Perry's Produce, Inc. is found to have committed willful, repeated, and flagrant violations of section 2(4) of the PACA, 7 U.S.C. §

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499b(4). The facts and circumstances of the violations shall be published pursuant to section 8(a) of the PACA, 7 U.S.C. § 499h(a).

23. This Order shall take effect on the 11th day after this Decision becomes final.

### **Finality**

24. This Decision and Order shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

Copies of this Decision and Order on the Written Record shall be served by the Hearing Clerk upon each of the parties.

Done at Washington, D.C.

## **APPENDIX A**

### **7 C.F.R.:**

#### **TITLE 7—AGRICULTURE**

#### **SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE**

#### **PART 1—ADMINISTRATIVE REGULATIONS**

....

#### **SUBPART H—RULES OF PRACTICE GOVERNING FORMAL**

#### **ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY UNDER**

#### **VARIOUS STATUTES**

...

#### **§ 1.145 Appeal to Judicial Officer.**

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a

## PERISHABLE AGRICULTURAL COMMODITIES ACT

party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

(b) *Response to appeal petition.* Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

(c) *Transmittal of record.* Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Oral argument.* A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument.

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Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument.* Argument to be heard on appeal, whether oral or on brief,

shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) *Notice of argument; postponement.* The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument.* The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs.* By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the [J]udicial [O]fficer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]

**MISCELLANEOUS ORDERS**

*[Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Miscellaneous Orders] with the sparse case citation but without the body of the order. Miscellaneous Orders issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported - Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: [www.dm.usda.gov/oaljdecisions](http://www.dm.usda.gov/oaljdecisions)*

**PETER CRANSTON.**  
**PACA Docket No. 11-0306.**  
**Miscellaneous Order.**  
**Filed August 11, 2011.**

**KDLO ENTERPRISES, INC.**  
**PACA Docket No. D-09-0038.**  
**Miscellaneous Order.**  
**Filed October 21, 2011.**

**PACA**

Charles Kendall, Esq. for AMS.  
Robert Radel, Esq. for Respondent.  
Initial Decision by Administrative Law Judge Jill S. Clifton.  
*Decision and Order by William Jenson, Judicial Officer*

**Order Denying Petition to Reconsider****PROCEDURAL HISTORY**

On September 28, 2011, KDLO Enterprises, Inc. [hereinafter KDLO], filed a petition for reconsideration of *In re KDLO Enterprises, Inc.*, \_\_ Agric. Dec. \_\_ (Aug. 3, 2011) [hereinafter Petition to Reconsider]. On October 14, 2011, Robert C. Keeney, Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Deputy Administrator], filed a response to KDLO's Petition to Reconsider. On October 18, 2011, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration of, and a ruling on, KDLO's Petition to Reconsider.

Miscellaneous Orders.  
70 Agric. Dec. 1118 - 1122

### CONCLUSIONS ON RECONSIDERATION

KDLO raises three issues in its Petition to Reconsider. First, KDLO asserts I deprived KDLO of its right under the Due Process Clause of the Fifth Amendment to the Constitution of the United States to be heard in person. KDLO asserts “[u]nder the constitution in the 5th amendment, it states that all person’s [sic] have a right to be heard in person, by hearing and that the Supreme court has upheld this right.” (Pet. to Reconsider at 1 ¶ 1.)

In *In re KDLO Enterprises, Inc.*, \_\_ Agric. Dec. \_\_ (Aug. 3, 2011), I concluded that, as KDLO admitted the material allegations of fact in the Complaint, there are no issues of fact on which a meaningful hearing could be held and issuance of a decision by reason of admissions and without hearing does not deprive KDLO of its rights under the Due Process Clause of the Fifth Amendment to the Constitution of the United States. While KDLO asserts the Supreme Court of the United States supports KDLO’s position that all persons have a right to be heard in person, KDLO fails to cite the cases upon which it relies, and I cannot locate any cases which support KDLO’s position. On the other hand, a number of courts have held that, when there is no issue of material fact in dispute, as in the instant proceeding, an in-person administrative hearing is generally not required.<sup>1</sup> Therefore, I reject KDLO’s assertion that it has a right under the Due Process Clause of the Fifth Amendment to the Constitution of the United States to an in-person hearing in the instant proceeding.

Second, KDLO asserts Kevin Pederson was responsibly connected with KDLO and the employment bar in 7 U.S.C. § 499h(b) is applicable

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<sup>1</sup> See, e.g., *Paige v. Cisneros*, 91 F.3d 40, 44 (7th Cir. 1996) (stating agencies no less than courts can grant summary judgment, and the due process clause does not require a hearing where there is no disputed issue of material fact to resolve); *Veg-Mix, Inc. v. U.S. Dep’t of Agric.*, 832 F.2d 601, 607-08 (D.C. Cir. 1987) (stating an agency may ordinarily dispense with a hearing when no genuine dispute exists); *The Louisiana Land and Exploration Co. v. FERC*, 788 F.2d 1132, 1137-38 (5th Cir. 1986) (stating, where there are no issues of material fact presented, an agency hearing is not required); *United States v. Consolidated Mines & Smelting Co.*, 455 F.2d 432, 453 (9th Cir. 1971) (stating it is settled law that, when no fact question is involved or the facts are agreed, a plenary, adversary administrative proceeding is not obligatory even though a pertinent statute prescribes a hearing).

## PERISHABLE AGRICULTURAL COMMODITIES ACT

to Mr. Pederson. KDLO contends the employment bar in the PACA is overly broad, not specific, punitive, and unconstitutional and application of the employment bar to Mr. Pederson would deprive Mr. Pederson of his ability to make a living and provide for his family. (Pet. to Reconsider at 1 ¶ 2.)

KDLO and the Deputy Administrator are the only parties in the instant proceeding. Mr. Pederson is not a party in the instant proceeding and no employment bar has been imposed on Mr. Pederson in the instant proceeding. The collateral consequences of the order against KDLO in *In re KDLO Enterprises, Inc.*, \_\_ Agric. Dec. \_\_ (Aug. 3, 2011), on an individual responsibly connected with KDLO are irrelevant to this proceeding, which involves only KDLO. Therefore, I decline to address KDLO's challenges to the employment bar in 7 U.S.C. § 499h(b) or KDLO's concerns regarding the affect of an employment bar on Mr. Pederson's ability to make a living and provide for his family.

Third, KDLO asserts the Secretary of Agriculture cannot impose sanctions on KDLO for failure to pay Evans Fruit Co. because Evans Fruit Co. failed to preserve its trust rights (Pet. to Reconsider at 1 ¶ 3).

When a produce buyer defaults on payment for produce, the buyer has committed a violation of 7 U.S.C. § 499b(4). The defaulting produce buyer is then subject to a sanction under the PACA. The produce buyer's violation of the PACA is not negated merely because the produce seller, who has perfected its trust rights under the PACA, enters into a post-default payment agreement with the defaulting buyer, even if the post-default agreement causes the produce seller to forfeit the trust protection provided in 7 U.S.C. § 499e(c).<sup>2</sup> The trust is a means to protect the produce seller's right to payment for produce; it is not a means to enforce the prompt payment provisions of the PACA in 7 U.S.C. § 499b(4). The Secretary of Agriculture can initiate an enforcement action against a defaulting buyer for a violation of 7 U.S.C. § 499b(4) without regard to any post-default agreement between the unpaid seller and the defaulting buyer.<sup>3</sup> Therefore, I reject KDLO's

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<sup>2</sup>*American Banana Co. v. Republic Nat'l Bank of N.Y.*, 362 F.3d 33, 47 (2d Cir. 2004) (stating produce sellers who agree to payment periods exceeding 30 days forfeit the trust protection in 7 U.S.C. § 499e(c)).

<sup>3</sup>*Baiardi Food Chain v. United States*, 482 F.3d 238, 243-44 (3d Cir.) (holding the loss of an individual produce seller's trust protection in 7 U.S.C. § 499e(c) does not



## Miscellaneous Orders.

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assertion that the Secretary of Agriculture cannot impose sanctions on KDLO for failure to pay Evans Fruit Co. because Evans Fruit Co. failed to preserve its trust rights.

KDLO also requests that I stay the Order issued in *In re KDLO Enterprises, Inc.*, \_\_\_ Agric. Dec. \_\_\_ (Aug. 3, 2011), until I rule on KDLO's Petition to Reconsider (Pet. to Reconsider at 1).

The rules of practice applicable to the instant proceeding<sup>4</sup> provide that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely-filed petition to reconsider (7 C.F.R. § 1.146(b)). KDLO's Petition to Reconsider was timely-filed and automatically stayed *In re KDLO Enterprises, Inc.*, \_\_\_ Agric. Dec. \_\_\_ (Aug. 3, 2011). Therefore, since KDLO's Petition to Reconsider is denied, I hereby lift the automatic stay, and the Order in *In re KDLO Enterprises, Inc.*, \_\_\_ Agric. Dec. \_\_\_ (Aug. 3, 2011), is reinstated.

For the foregoing reasons, the following Order is issued.

**ORDER**

KDLO's Petition to Reconsider, filed September 28, 2011, is denied. This Order shall become effective upon service on KDLO.

Done at Washington, DC

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**AMERICA FRESH, LLC.**  
**PACA Docket No. 11-0364**  
**Miscellaneous Order.**  
**Filed November 3, 2011.**

**JOHN MCDANIEL.**  
**PACA Docket No. 12-0020.**  
**Miscellaneous Order**  
**Filed November 9, 2011.**

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operate to divest the Secretary of Agriculture of his power to enforce the PACA), *cert. denied*, 552 U.S. 890 (2007).

<sup>4</sup>The rules of practice applicable to the instant proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151).

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PERISHABLE AGRICULTURAL COMMODITIES ACT

**HEIN HETTINGA AND ELLEN HETTINGA d/b/a SARAH  
FARMS.**

**PACA Docket No. 08-0070.**

**Miscellaneous Order.**

**Filed November 10, 2011.**

Default Decisions  
70 Agric. Dec. 1123 - 1124

**DEFAULT DECISIONS**

*[Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Default Orders] with the sparse case citation but without the body of the order. Default Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported - Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: [www.dm.usda.gov/oal/decisions](http://www.dm.usda.gov/oal/decisions)]*

**DEL CAMPO, INC.**  
**PACA Docket 11-0202.**  
**Default Decision.**  
**Filed July 19, 2011.**

**DUTCHIE BOY PRODUCE, INC.**  
**PACA Docket 11-0216.**  
**Default Decision.**  
**Filed October 14, 2011**

**FLORIDA PRIME MUSHROOMS, INC., d/b/a QUINCY FARMS.**  
**PACA Docket 11-0366.**  
**Default Decision.**  
**Filed November 9, 2011.**

**MARINA PRODUCE INC.**  
**PACA Docket 11-0395.**  
**Default Decision.**  
**Filed December 8, 2011.**

**LEO L. COTELLA & CO., INC.**  
**PACA Docket 11-0212.**  
**Default Decision.**  
**Filed December 20, 2011.**

**BLUE CHIP COMPANIES, LLC, et al.**  
**PACA Docket 11-0042.**  
**Default Decision.**  
**Filed December 29, 2011.**

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PERISHABLE AGRICULTURAL COMMODITIES ACT

**VINCENT GIUFFRIDA.**  
**PACA Docket 11-0129.**  
**Default Decision.**  
**Filed December 29, 2011.**

**PERISHABLE AGRICULTURE COMMODITIES ACT**

Richard Vega, PACA-D-11-0323, 12/09/11.